IN THE

Supreme Court of the United States.

No. 408.

SUMPTER TURNER, SYNDIC OF M. SCHWARTZ & CO.,
PLAINTIFF IN ERROR.

versus

F. L. RICHARDSON, RECEIVER OF THE AMERICAN NATIONAL BANK,
DEFENDANT IN ERROR.

ON WRIT OF ERROR FROM SUPREME COURT, STATE OF LOUISIANA.

Brief of Plaintiff in Error, on Motion to Dismiss and Affirm.

STATEMENT OF CASE.

The American National Bank of New Orleans failed on August 5th, 1896, and Frank L. Richardson was appointed receiver.

M. Schwartz & Co., a commercial firm of New Orleans, La., made a surrender under the insolvency laws of that State; and Edward Weil and Sumpter Turner were elected by a creditors'

meeting, and confirmed, as definitive syndics of said firm. R. 206-9.

On January 12th, 1898, Frank L. Richardson, receiver of the aforesaid bank, by petition filed in the Civil District Court for the Parish of Orleans, State of Louisiana, applied to have sold at public auction eight hundred shares of the stock of the Schwartz Foundry Co., Ltd., and other securities pledged to the bank, to pay an alleged indebtedness of some eighty-eight thousand dollars, and for a recognition and enforcement of a pledge on said securities for said amount; this proceeding being taken against the syndics of M. Schwartz & Co. R. 1-5.

To this petition, exceptions were filed and overruled, and the case was then put at issue by answer filed. R. 5-7, 190.

The case was tried, and judgment in favor of the Receiver rendered by the State Court, in the sum of $10,000 on notes, with recognition of a pledge on 200 shares of Schwartz Foundry Co., Ltd., stock, and in the sum of over $60,000 on open account, with recognition of a pledge on 500 shares of Schwartz Foundry Co., Ltd., stock, and other securities; the judgment decreeing that the stock and securities be sold at public auction, and the proceeds applied *pro tanto* to the satisfaction of the judgment. See judgment, R. 196-7.

From that judgment, a suspensive appeal was taken to the Supreme Court of Louisiana by the syndics. See motion and order of appeal, R. 198-9, and bond of appeal, R. 200.

One of the syndics, Edward Weil, dying while said appeal was pending, it was agreed to conduct the proceedings in the name of the surviving syndic, Turner. R. 223, foot.

In the Supreme Court of Louisiana, plaintiff in error assigned the following errors, among others, as patent upon the face of the record, to-wit:

SUPREME COURT, STATE OF LOUISIANA.

F. L. Richardson, Receiver of the American National Bank,

vs.

Sumpter Turner and Edward Weil, Syndics of M. Schwartz & Co.

No. 13,204.

The defendants assign as errors patent upon the record, the following:

* * * * * *

2nd. That it is not averred nor proved by plaintiff, nor does the record show the averment and proof, that the Receiver of the American National Bank was authorized to sue and stand in judgment herein, nor that the Receiver was authorized to have sold the collaterals set up as pledged at public auction in the manner demanded by the Receiver or ordered by the Court; that without the direction and authorization required under Sec. 5234 of the United States Revised Statutes the Receiver was incompetent to stand in judgment herein and to have sold or to cause to be sold the stocks, bonds, and securities belonging to or pledged to the American National Bank, and that therefore his demand for a judgment for the amount claimed, with recognition of a pledge, and his demand to have the alleged pledged collaterals sold, should be rejected at his costs.

(Signed) LAZARUS & LUCE,
Attorneys for Syndics.

Endorsed: Supreme Court, State of Louisiana. F. L. Richardson, Rec'r American National Bank, vs. Sumpter Turner and Edward Weil, Syndics of M. Schwartz & Co. Assignment of errors. Filed March 5th, 1900. (Signed) Paul E. Mortimer, Deputy Clerk.

The Louisiana Supreme Court, on May 7th, 1900, affirmed the judgment of the lower Court. See minute entry, R. 230, and opinion of Louisiana Supreme Court, R. 226-30. In that opin-

ion, with reference to the Federal question raised by the assignment of errors, the Louisiana Supreme Court said:

"Another contention of defendants, assigned as error here, is that it was necessary for the Receiver to aver and prove he was authorized by the Comptroller of the Currency, U. S. Treasury Department, to institute the present action, and to sell at public auction the collaterals pledged to secure the indebtedness declared on, and that without this authorization the judgment recovered cannot stand.

"This position has no sufficient basis in law to rest upon.

"Section 5234 of the Revised Statutes of the United States provides that the Receiver of a national banking association, 'under the direction of the Comptroller, shall take possession of the books, records and assets of every description of such association, collect all debts, dues and claims belonging to it, and, upon the order of a court of record of competent jurisdiction, may sell, or compound all bad or doubtful debts, and, on a like order, may sell all the real or personal property of such association, on such terms as the Court shall direct'.

"The Receiver here could not sell the collaterals in his hands without obtaining the order of a Court of competent jurisdiction and this order must fix the terms of the sale.

"The object of this suit was to obtain such an order. The Civil District Court of the Parish of Orleans is a court competent to grant the order. It did so.

"We do not find from the statutory law, nor from the decisions of the courts, that before applying to the Civil District Court for the order to sell the pledged stocks and bonds, the Receiver must obtain the formal authorization of the Comptroller to make the application, and that in addition to the order of Court, he must also have the formal authority of the Comptroller to sell.

"The language of the statute authorizing the appointment of a Receiver to act under the direction of the Comptroller means no more than that the Receiver shall be subject to the direction of the Comptroller. It does not mean he shall do no act without special instructions. His very appointment makes it his duty to collect the assets and debts of the association. With regard to the ordinary assets and debts no special direction is needed; no unusual exercise of judgment is required. They are to be collected, of course; that is what the Receiver is appointed to do.

"This was the language of the Court in Bank vs. Kennedy, 17 Wall., 19, 21, 22.

"It is true a Receiver cannot bring a suit to enforce a stockholder's liability until the Comptroller ascertains that it is necessary to assess the stock, fixes the amount of such assessment, and gives him authority to collect. That is because stockholders are not ordinary debtors of the bank. The distinction between a suit of that character and the one at bar is clearly pointed out in Bank vs. Kennedy, *supra*.

"See also Morse on Banks, Sec. 150.

"Boone on Law of Banking, Sec. 433.

"Morrison vs. Lee, 24 Blatchf., 291, 294.

"Hayden vs. Thompson, 71 Fed. Rep., 60, 64, 65, 66."

And R., 229, further said: "Yet, since under the Statutes of the United States regulating the action of receivers appointed to insolvent national banks, the Receiver herein could not sell the collaterals in question in his hands except upon the order of a court of record of competent jurisdiction, it were necessary for him to take proceedings to obtain such order.

" He could not be compelled to wait such time as the Syndics of Schwartz & Co. might see proper to take before filing a tableau of distribution, even if the question here arising could properly be determined in a contest over such tableau.

" The Receiver was entitled to take action at any time, the claim of his principal being due, to realize on the pledged stocks and bonds.

" He could not be expected to make parties to his suit, to obtain the order to sell, all the creditors of Schwartz & Co.

" He was not obliged to litigate with them his right to obtain such order.

" His suit is not even one to establish a pledge claimed. He tells the court the insolvent firm of Schwartz & Co. owes him, in his official capacity, an indebtedness, and to secure it he has in pledge certain stocks and bonds which he wants to sell in order to realize payment of the indebtedness. He asks an order to sell. As incidental to his right to obtain this order he must establish the indebtedness he claims, and he does so."

Plaintiff in error applied to the Louisiana Supreme Court for

a rehearing, R. 231-2, in their petition therefor, under the sixth ground, saying:

"That the court erred in holding that without averment and proof that he was authorized and directed by the comptroller of the United States Court, the Receiver of the American National Bank had authority to sue and stand in judgment to have a pledge recognized on the securities held by him, and to have the securities and collaterals sold at public auction or otherwise; that the defendant Syndic and the insolvents represented by him are entitled to have the judgment and discretion of the comptroller exercised as to whether said securities shall be sold or held, the time, manner, and terms of the sale, and the court erred in holding that the Receiver could sue and act without the authority and discretion of the comptroller."

The rehearing was refused, R. 233; and from this final decree of the Louisiana Supreme Court a writ of error was prosecuted to and lodged in this honorable court. With the petition for a writ of error there was made and filed the following assignments of error (R. 237-9):

FIRST.

That under Sec. 5234 of the United States Statutes and its provisions, relating to national banks, plaintiff in error, owner of the pledged securities which were declared upon and the sale of which was asked in the suit of F. L. Richardson, Receiver of the American National Bank, vs. Sumpter Turner and Edward Weil, Syndics of M. Schwartz & Co., in the State courts of Louisiana, is entitled to the right and privilege of having the application to sell such securities, the sale thereof, and the time and manner of the sale, under the direction and authority of the Comptroller of the Currency; that plaintiff in error, in the Supreme Court of Louisiana, by his assignment of errors and as shown by the records in said proceeding, claimed and set up that he was entitled to the privilege and right of having the Comptroller of the Currency direct and authorize the application to sell, having the sale ordered, and the manner, terms, and time of said sale, and of having the sanction and seal of the approval, judgment, and discretion of said Comptroller, under said Sec. 5234 of the United States Statutes and its provisions; and set up

and assigned that he had the right and was entitled to the immunity or relief of having the application for the sale of said securities rejected, for the reason that the sale of pledged securities was not authorized under Sec. 5234 of the United States Statutes, such statute applying only to the sale of property belonging to the bank, and that the Receiver was incompetent to stand in judgment in said proceeding; and that the judgment of the Supreme Court of Louisiana was adverse to the right and privilege of plaintiff in error to have the Comptroller of the Currency authorize and direct the sale of said securities, and to give such application to sell, and the sale, and the time and manner thereof, the sanction of his discretion, judgment, and authority, under and by virtue of Sec. 5234 of the United States Statutes and its provisions—a right and privilege to which plaintiff was entitled; and that the said Supreme Court of Louisiana held and decreed that the said Receiver could make the application to sell and could sell the securities, under and by virtue of Sec. 5234 of the United States Statutes and its provisions, without the direction and authority of the Comptroller of the Currency, and further held and decreed that said Receiver was competent to stand in judgment in said proceeding; and that said final judgment of the Supreme Court of Louisiana is an erroneous construction of Sec. 5234 of the United States Statutes, and is violative of said statute and its provisions.

SECOND.

That under the settled jurisprudence of the Supreme Court of Louisiana, the highest court in said State, the said Court and all the courts of Louisiana will notice their want of jurisdiction *ratione materia*, either *ex proprio motu* or on its being called to the Court's attention, and the Court, when without jurisdiction *ratione materia*, will dismiss and set aside the proceedings or judgment;

That in his brief for rehearing in said cause, defendant and plaintiff in error argued and urged that jurisdiction over and affecting the liquidation of national banks, was vested exclusively in the United States Circuit Courts and the Federal Courts, and that the State Courts were without jurisdiction, in the said cause, to grant and order the sale authorized under Sec. 5234 of the United States Statutes and its provisions, said defendant and

plaintiff in error citing paragraphs 3, 10 and 11 of Sec. 629 of the United States Statutes, and the proviso of Sec. 4 of the Act of Congress, adopted Aug. 13th, 1888; that said paragraphs and said proviso vested the Courts of the United States with exclusive jurisdiction in cases commenced by the United States by direction of any officer thereof, or cases for winding up the affairs of such (national) banks.

That the want of jurisdiction *ratione materia* was shown by the pleadings and the record; that defendant and plaintiff in error was entitled to the right, privilege, or immunity of having a court of competent jurisdiction pass upon and determine the application to sell, the sale, and the manner, terms, and time thereof; and that the Supreme Court of Louisiana, in its final decision refusing the rehearing and sustaining its own jurisdiction and that of the State Courts, necessarily and in effect decided adversely to the right of plaintiff in error to have said proceeding and judgment dismissed and set aside for want of jurisdiction *ratione materia* in the State Courts, and to have said matter and controversy determined by the Federal Courts of competent jurisdiction, and was violative of the Act of Congress adopted Aug. 13th, 1888, and the proviso above mentioned.

That the Supreme Court of the State of Louisiana erred in holding and decreeing in its final judgment:

1. That the defendant and plaintiff in error was not entitled to the right and privilege, under Sec. 5234 of the United States Statutes and its provisions, to have the direction and authority of the Comptroller of the Currency for the application to sell such securities, the sale, and the time, manner, and terms thereof;

2. That defendant and plaintiff in error was not entitled to have the proceedings for the sale instituted and prosecuted by a person competent to stand in judgment, and that the Receiver was competent to make such application to sell and to prosecute the same and stand in judgment;

3. In holding that the Supreme Court of Louisiana and the State Courts had jurisdiction *ratione materia,* and in denying the exclusive jurisdiction of the United States Courts;

4. That the Court further erred in not setting aside the judgment of the lower State Court, and rejecting the demand of the defendant in error, on these grounds:

That the Supreme Court of Louisiana is the highest Court in

said State in which a decision of the aforesaid suit and controversy could be had.

That the errors in said final judgment and decree of the Supreme Court of Louisiana, and the proceedings anterior thereto, are those specially set out and enumerated above; and they entitle plaintiff in error to a reversal of said final decree and judgment of the Supreme Court of Louisiana, and a rejection by this Court of the demands of the Receiver of the American National Bank.

Wherefore, plaintiff in error prays that the judgment of said Supreme Court of the State of Louisiana be reversed; and that such directions may be given that full force and efficacy may enure to plaintiff in error by reason of his defenses set up and urged in said cause.

In this Court, defendant in error has filed what he terms a motion to dismiss and affirm, with a brief in support thereof, and which motion reads:

"And now comes the defendant in error and moves the Court to dismiss the Writ of Error herein in the above entitled cause for want of jurisdiction, because the judgment or decree from which the Writ of Error purports to have been taken is the judgment or decree of the Supreme Court of one of the United States, to-wit: the Supreme Court of the State of Louisiana.

"And the said defendant in error, by counsel as aforesaid, also moves the Court to affirm the said judgment or decree from which the said Writ of Error purports to have been taken, because although the record in said cause may show that this Court has jurisdiction in the premises, yet it is manifest that said appeal was taken for delay only."

In the statement of the case by defendant in error, on page 2 of his brief, he says:

"The stock of this Foundry Company was then under control of the Civil District Court of the Parish of Orleans, Division 'E,' through its Syndic, Sumpter Turner, and was subject to the possession and pledge made to the American National Bank, whose rights were transferred to the Receiver, plaintiff in error."

This is erroneous. The stock of the Foundry Company is in the possession and control of the Receiver of the American Na-

tional Bank, as a pledge and security for the indebtedness due the bank by the insolvent commercial firm of M. Schwartz & Co. There has been no appointment of a Receiver to the Schwartz Foundry Company, and it is not in liquidation. Syndics were appointed by the Civil District Court to the commercial firm of M. Schwartz & Co. The Receiver was not compelled to sue in the State Court; he could have sued in the Federal Court. The State Court had not the foundry stock, the security, the *res*, in its control.

ARGUMENT.

The assignment of errors raising the Federal questions, was filed in the Supreme Court of Louisiana. The Louisiana Code of Practice, Art. 807, authorizes averments of errors of law appearing upon the record, in the Supreme Court.

The motion made in this case is not a motion to dismiss, because no Federal question is involved, and to affirm because the decision of the Supreme Court of Louisiana on the Federal question involved, was clearly and undoubtedly correct; but is made because "the judgment or decree from which the writ of error purports to have been taken, is the judgment or decree of the Supreme Court of one of the United States, to wit, the Supreme Court of the State of Louisiana."

Now, we submit, that such is not a motion to dismiss; that it alleges no ground or reason for dismissal; and that it should be denied or overruled by this Court.

Defendant in error moves the Court to affirm because "it is manifest that said appeal was taken for delay only." Such is not a motion to affirm; it sets out no ground or reason for affirming; and it should be ignored or denied by this Court.

The motion filed raises no issue which would authorize this Court to either dismiss or affirm the judgment of the Louisiana Supreme Court; and it should be denied.

The learned counsel, in their brief, do not even discuss the motion to dismiss, or cite any authorities in support of dismissal

because of the want of jurisdiction—because there is no real Federal question involved. We do not contend that the mere averment of a Federal question will raise an issue which the Court will be called on to determine. We understand that this Court has the power and the right to examine, consider, and determine whether a real and not fictitious Federal question has been raised, and whether the case could be finally determined without deciding such Federal question; but if a Federal question is raised, the Court has jurisdiction, and has no right or power, under the statute, to dismiss because, in its opinion, the Federal question was wrongfully and improperly raised; for if such a ruling prevailed, the Court would only maintain its jurisdiction and consider the merits in cases entitling parties to the maintenance of Federal questions raised, and would never determine the merits of such questions in their regular and ordinary order.

Said Chief Justice Chase, in Millingar vs. Hartupee, 6 Wall., 261:

"Something more than a bare assertion of such an authority seems essential to the jurisdiction of this Court. The authority intended by the Act is one having real existence, derived from competent governmental power. If a different construction had been intended, Congress would doubtless have used fitting words. The Act would have given jurisdiction in cases of decisions against claims of authority under the United States.

"In respect to the question we are now considering, 'authority' stands on the same footing with 'treaty' or 'statute.' If a right were claimed under a treaty or statute, and on looking into the record, it should appear that no such treaty or statute existed, or was in force, it would hardly be insisted that this Court could review the decision of a State Court, that the right claimed did not exist."

And in the same case, on page 262, the Court also said:

"In many cases the question of the existence of an authority is so closely connected with the question of its validity that the Court will not undertake to separate them, and in such cases the question of jurisdiction will not be considered apart from the

question upon the merits, or except upon hearing in regular order."

See, also, New Orleans vs. New Orleans Waterworks Co., 142 U. S., 87-8; Hamblin vs. Western Land Co., 147 U. S., 532; California Bank vs. Kennedy, 167 U. S., 366-7; and Wilson vs. North Carolina, 169 U. S., 595.

Unquestionably, a Federal question is raised and involved, and such Federal questions are:

1. The right of plaintiff in error to have the authority, judgment, and direction of the Comptroller as to the sale of the securities pledged and the terms of sale; and the denial thereof by the Supreme Court of Louisiana;

2. That, under Sec. 5234 of the United States Statutes, the Receiver, with or without the authority of the Comptroller, was not warranted or authorized to sell or proceed to have sold property or securities pledged to the bank, and was not competent to stand in judgment in such application;

3. That the Federal Courts had exclusive jurisdiction of such a proceeding, and the State Courts were without jurisdiction *ratione materia.*

HAS THE RECEIVER OF THE AMERICAN NATIONAL BANK THE RIGHT TO BRING A SUIT AND STAND IN JUDGMENT AS PLEDGEE AND HAVE THE PLEDGED PROPERTY SOLD WITHOUT BEING AUTHORIZED BY THE COMPTROLLER?

In a suit to enforce the liability of stockholders, in Kennedy vs. Gibson *et als.*, 8 Wallace, 505, this Court said:

"The Receiver is the instrument of the Comptroller. He is appointed by the Comptroller, and the power of appointment carries with it the power of removal. It is for the Comptroller to decide when it is necessary to institute proceedings against the stockholders and enforce their personal liability; and whether the whole or a part, and if only a part, how much, shall be collected. These questions are referred to his judgment and *discretion,*

and his determination is conclusive. Stockholders cannot controvert it. It is not to be questioned in any litigation that may ensue. He may make it at such time as he may deem proper and upon such data as shall be satisfactory to him. This action on his part is indispensable whenever the personal liability of the stockholder is sought to be enforced, and must precede the institution of suit by the Receiver. The fact must be distinctly averred in all such cases, and if put in issue, must be proved."

In the case of Bank vs. Kennedy, 17 Wallace, pp. 21 and 22, especially on page 22, this Court held: That receivers of national banks could bring suits to collect *ordinary debts* without the authorization of the Comptroller. But where the bringing of a suit or course of procedure involves a question of direction or judgment or of policy, averment and proof of direction and authorization are necessary. In suing to have a pledge recognized and pledged collaterals sold, the discretion and judgment of the executive officer of the government are necessary to be brought into action. Stocks pledged to a national bank or any other company or corporation are virtually, if not really, the properties of the pledgee to the amount of the pledge. There is at least a qualified ownership, or an ownership to the amount of the pledge. See National Bank vs. Case, 99 U. S. 631. Their sale and disposition was a question to be determined in the discretion and judgment of the Comptroller. The Comptroller, in the exercise of judgment and discretion, might have pursued a different policy, or line of procedure, might have concluded that it was not desirable to force a sale at public auction, and the probable sacrifice of the stocks pledged in the manner demanded in this proceeding or at the time that the proceeding was taken.

If these pledged collaterals are sold in this proceeding, and under a judgment in these proceedings, then assets of the American National Bank, to that extent, are sold and the proceeds brought into the fund for the creditors of the bank, the time and manner of sale determined without reference to the Comptroller, or the exercise of his judgment and discretion.

We can understand that in a case where it is purely and simply

a suit on an ordinary debt for the collection of the debt, as in the case of Bank vs. Kennedy, 17 Wallace, statement of facts of which will be found on page 20, the statutory authority given the receiver to collect the debts will be sufficient. But the Receiver in this case is not only exercising judgment and discretion as to whether these collaterals of the American National Bank shall be sold or disposed of at the time determined by him, but he is seeking to dispose of them out of the usual and ordinary course authorized in ordinary procedure, by an auctioneer, instead of a sale under execution and by the sheriff.

It might be that the securities pledged largely exceeded the debt in value, and that the sale of all the securities was unnecessary. It might be that they should be sold in the business or winter season, and not in the summer or vacation season, or during an epidemic or financial panic. The Receiver might ask for a cash sale; the Comptroller's judgment might be that a sale part cash and part on time, with good security, was the best course. Under Sec. 5234, U. S. Statutes, the Court fixes the terms of sale. If the applicant calls upon the Court and makes a showing as to what in his judgment are terms which will serve and protect the interests of the banking association and its creditors, the Court would give great weight to the judgment of the Comptroller.

In this connection, we would refer to the decree of the State Court, R. 197, and call attention to the fact that it fixes no terms whatever, whether the property be sold entirely or partly for cash, and provides for no appraisement, or whether the property should be sold for its appraised value, or to the highest bidder. There being no limitation or fixing of terms, the pledged securities, under the Louisiana Revised Statutes, Sec. 169, would go to the highest bidder, no matter what might be the sacrifice. The defunct bank could not bid—at all events, would not bid—unless under the direction of the Comptroller. The suspended bank would not be bound by any bid made by the Receiver, without authority from the Comptroller. Doubtless the Comptroller

would, in his judgment, decline to authorize a bid even to prevent a sacrifice, when by such a bid the banking association would become a stockholder in the Foundry Company, and liable to all the obligations of such a stockholder. National Bank vs. Case, 99 U. S. 631; California Bank vs. Kennedy, 169 U. S. 366. In any event, such questions should be considered and determined by the Comptroller. His judgment should determine when and on what terms the sale should be had; and he should consider and determine, in advance of making the application for a sale, whether there should be a limit or no limit, and whether the association should bid in order to prevent a sacrifice of the securities.

This is not an ordinary suit to collect an ordinary indebtedness, as in Bank vs. Kennedy, 17 Wall.

WAS THE RECEIVER COMPETENT TO STAND IN JUDGMENT AND ASK FOR THE SALE OF PLEDGED SECURITIES?

Sec. 5234 of the U. S. Statutes authorizes the sale of the real and personal property of the National Banking Association, and does not provide for nor authorize the selling of securities or property of others pledged to such association. The statutory authorization in Sec. 5234 reads:

"May sell all the real and personal property of said association, on such terms as the Court shall direct."

Therefore, if authority cannot be found in Section 5234 to justify the Receiver in securing an order of Court for the sale of the pledged securities, and to fix the terms of sale, or found in some other statute under the National Banking Laws, then the receiver is vested with no such authority under the laws of the United States. There is no such authority to be found in Section 5234, and none in that portion of the United States Statutes relating to national banks and their receivers. Consequently, the receiver was utterly without authority to proceed and have sold, on an order of Court, either State or Federal, the pledged securities, under and by virtue of any provision in Section 5234, or of the National Banking Laws. Being without such authority,

he cannot invoke the powers of the Court to order the sale and fix the terms thereof, as provided in Section 5234.

In re Earle, 92 Federal Reporter, 221, an application by the receiver of a national bank, under Section 5234, United States Revised Statutes, to sell certain certificates of stock which had been pledged to the bank, was made. The Court rejected the application, holding that that section applied to the sale of property of the bank, and not to the property pledged to the bank. We quote the syllabus:

"The Courts are not vested with any general supervisory or directing power over the liquidation of insolvent national banks, and cannot order or authorize a receiver to sell at private sale securities held by the bank as pledgee, which do not come within the authority given by Revised Statutes, Section 5234, to order the sale or compounding of bad or doubtful debts, or the sale of real or personal property of the association."

If the Receiver was without authority, under the statute, to apply and stand in judgment in an application to sell pledged securities of the banking association, even if there were inconsistent pleas, he could not acquire the capacity to stand in judgment by reason of any estoppel arising from the inconsistent pleading.

The proceeding of the Receiver to sell the securities, and incidentally to have the indebtedness fixed, was either under Section 5234, U. S. Statutes, or it was not. The Louisiana Supreme Court, in its opinion (R. 227-8) holds the proceeding under and authorized by Section 5234, and on R. 227, says:

"The Receiver here could not sell the collaterals in his hands without obtaining the order of a Court of competent jurisdiction, and this order must fix the terms of sale."

The object of this suit was to obtain such an order.

Again, R. 229, the Supreme Court of Louisiana said:

"He asks an order to sell. As incidental to his right to obtain this order, he must establish the indebtedness he claims, and he does so."

Consequently, we see that the proceeding was based on Section

5234 of the U. S. Statutes. If it had been based on the articles of the Louisiana Code, the sale would not have been at auction without limit, but the same formalities in all respects would have been observed as in ordinary cases (Louisiana Civil Code, Art. 3165), which means that the sale would have been under execution by the sheriff, after appraisement, and at not less than two-thirds of the appraisement.

Had the Federal Courts Exclusive Jurisdiction?

The Court will find, by reference to the petition of the receiver, R. 1-5, that it was the commercial firm of M. Schwartz & Co., in insolvency in the State Court, and not the Schwartz Foundry Co.; that the foundry stock and securities pledged were necessarily and as a matter of fact, in the possession and control of the Receiver of the American National Bank, and not of the syndics of M. Schwartz & Co., officers of the State Civil District Court. Therefore, the Receiver was not compelled to proceed in the Civil District Court because it had control and jurisdiction of the *res.*

If the State Courts were utterly without jurisdiction, it was their duty to dismiss the proceedings *ex proprio motu* and such is the jurisprudence of Louisiana. Where there is a want of jurisdiction *ratione materia,* it is not too late to suggest or raise it on rehearing or at any time.

Have the Federal Courts exclusive jurisdiction?

The paragraphs under Section 629, United States Revised Statutes, providing for jurisdiction of the United States Courts, paragraphs 3, 10 and 11, read as follows:

Par. 3: "Of all suits at common law, where the United States, or any officer thereof suing under the authority of any Act of Congress, are plaintiffs."

Par. 10: "Of all suits by or against any banking association established in the district for which the Court is held, under any law providing for national banking associations."

Par. 11: "Of all suits brought by (or against) any banking association established in the district for which the Court is held, under the provisions of title 'The National Banks,' to enjoin the Comptroller of the Currency, or any receiver acting under his direction, as provided by said title."

It has been held by the United States Courts that the receiver of a national bank is answerable to the U. S. Court, under paragraph 3, and that he has a right to sue in the U. S. Courts; and par. 3 has never been amended or repealed, and still stands as the law. Par. 10 has been repealed in so far as concerns any banking association; but the repealing act has the proviso that it shall not affect the U. S. Circuit Court in the liquidation of banks. The proviso reads:

"The provisions of this section shall not be held to affect the jurisdiction of the Courts of the United States in cases commenced by the United States by direction of any officer thereof, or cases for winding up the affairs of such bank." See Sec. 90, Desty's Fed. Proc., Vol. 1, 8th Ed.

The repealing act, with this proviso, is found in the Supplement to the U. S. Rev. Stat., 1874 to 1891, page 614, Chap. 866, Sec. 4, Act of Congress adopted Aug. 13, 1888. Now, the State Courts, under par. 10 and probably par. 3 of Sec. 629, had concurrent jurisdiction with the U. S. Courts; but the liquidation of banks being in the hands of the Comptroller of the United States, and as he has to account to the U. S. Circuit Court, the latter tribunal is charged with jurisdiction of the liquidation and administration of national banks. Unquestionably, the powers vested in the receiver under Sec. 5234 are powers of administration and liquidation, and jurisdiction over the acts of the receiver in such liquidation, and the granting of orders to the receiver, is properly lodged in the Federal Courts. Especially is this the case with reference to what are purely administrative powers, such as the sale of property, and the sale or compounding of debts. Otherwise, if the State and Federal Courts were both vested with jurisdiction, there would result a conflict in the various orders granted by the

different Courts, which would bring about confusion and disorder in the administration.

On the question of the jurisdiction of the U. S. Courts, and the effect of the repealing legislation on Sec. 629, U. S. Rev. Stat., and the paragraphs thereunder, we refer to:

Yardley vs. Dickson, 47 Fed. Rep. 635; Fisher vs. Yoder, 53 Fed. Rep., 565; Stephens vs. Bernays, (Dist. Court), 41 Fed. Rep., 401; Same vs. Same (Circuit Court), 44 Fed. Rep., 612.

Respectfully submitted,

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